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ILLINOIS FENCE LAW

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Circular 1211

University of Illinois at Urbana-Champaign
College of Agriculture
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THIS CIRCULAR has been written to answer many of the questions that Illinois farmers and other landowners ask about their rights and duties in regard to fences. Illinois laws supply the answers to some of these questions, particularly chapter 54 of the Illinois Revised Statutes. Other answers come from court decisions. The answers to some questions have not yet been settled and can only be conjectured.

Cooperation between neighboring landowners can prevent some fence problems and solve others. Even when both parties are cooperative, however, questions arise about which adjoining owners may have an honest difference of opinion.

This circular may be used to help resolve some of these differences of opinion. It is not designed, however, as a substitute for legal counsel. When a dispute arises or seems likely to arise, the landowner should consult an attorney.

GENERAL FENCE LAW

The Duty to Confine Animals

The object of fencing is not to keep other people's animals off an occupant's premises, but rather to keep the occupant's animals at home. Illinois courts therefore hold that all persons have the duty to fence their animals in and that their neighbors have no duty to fence them out. An owner who fails to confine animals properly can be held liable for the damage they cause, regardless of whether the property of the injured person was fenced. For example, if animals driven along a road get out of control and enter adjoining fields, the owner of the animals may be held liable for the damage the animals cause, even though the fields are not protected by a fence.

The term *animals* includes cattle, horses, sheep, hogs, and other stock. It also includes poultry, and therefore poultry owners also have the duty to confine their animals to prevent trespass.

Dogs and cats traditionally have not been included in this legal definition of animals so far as trespass laws are concerned. The owners may be held liable, however, for any actual damages caused by their pets even though no technical trespass may have occurred. In addition, municipal, county, or township ordinances may require confinement of dogs and cats.

Liability for Trespass by Animals

Whenever a domestic animal goes onto any premises without the consent of the owner of the premises, the animal technically trespasses, whether or not the premises are fenced. The owner of the trespassing animal may therefore be held liable for any damages caused by the trespass, unless that owner has used reasonable care to restrain the animal from running at large and makes "immediate pursuit" on discovering that the animal has escaped.

Injury to crops, persons, other livestock, and property, and the service of female animals are the most common damages. Illinois courts have allowed recovery for each of these types of damages. The amount that can be recovered is based on the best evidence of actual loss, for example, the impairment of crop yield, the value of an animal killed or injured, and the difference in value of progeny.

The spread of disease is another type of damage for which courts have allowed recovery. Legal authority suggests, however, that owners are not liable for damage due to disease spread by their trespassing animals unless they knew or suspected that the animals were diseased.

As in all injury cases, negligence or fault on the part of the injured party may affect the amount recovered. In April 1981, the Illinois Supreme Court adopted a new law for determining the damages to be awarded to an injured party who was negligent. Under this newly adopted system of "pure comparative negligence," the amount of fault attributed to the injured party proportionately affects the amount of damages recovered from the other negligent party. For example, an injured person determined to be 60 percent at fault might still recover 40 percent of the amount of his or her damages. Because this system of comparative negligence is new to Illinois, the courts will spend a number of years working out the details of its application in specific cases.

The fact that an owner's animals have caused injury or damage does not always mean that the owner will be liable. In fact, an owner completely free of negligence or fault in the incident may not be held liable. For example, if a highway commissioner wrongfully tears out a fence or a storm blows a fence down, the owner of that fence cannot be held liable for the damage his or her animals do unless the owner fails to make "immediate pursuit" of the animals after discovering the break in the fence.

When animals escape through a division fence (discussed later), their owner may not be held liable if the escape was made through the adjoining owner's portion of the fence and evidence shows that the adjoining owner's portion of the fence was not in good repair. An Illinois court has held, however, that an owner who turns animals out knowing that the neighbor's portion of the fence will not restrain them may be held liable

for their trespass. The court reasoned that the owner of the animals has a right under the law to make the adjoining owner repair the fence or pay for having the repair made and that the owner should have used this remedy.

One need not own animals to be liable for damage caused by trespass. Those who take care of animals for others (agisters or stablekeepers for example) assume liability for trespassing animals in their charge just as the owners do. But keepers may not be held liable if they can show that they used reasonable care in restraining the animals and did not know that the animals were at large.

As a rule, a landlord is not liable for the trespass of a tenant's livestock. A landlord might be held liable, however, if a livestock-share arrangement creates a legal partnership that makes the tenant an agent of the landlord. Furthermore, under the principle that an employer is liable for the acts of employees while they are engaged in the employer's work, a livestock owner may be held liable for trespass resulting from the negligence of a hired hand.

Animals on Highways

Farm animals — calves and hogs particularly — often get out on highways. A highway user who runs into an animal and is injured or has a damaged vehicle usually seeks compensation from the owner of the animals. Although no one can predict exactly what damages, if any, will be recovered in a particular instance, certain general rules apply:

- Farmers negligent in maintaining fences may be liable for the damage the escaped animals cause to persons using the highway.
- Farmers who maintain fences in good repair yet keep animals that they know are in the habit of breaking out may be held liable for damages caused by the animals when they do break out.
- If adequate fences are maintained and animals not in the habit of breaking out get through the fence and onto a highway, the owners may be held liable for the damages the animals cause if the owners know the animals are out and if they make no reasonable effort to get the animals back. Owners are not liable for injuries caused by their loose animals if they can establish both that they used reasonable care in restraining the animals and that they did not know that the animals were at large.
- Farmers who drive animals along, across, or on a highway, particularly a paved highway, may become liable on the grounds of negligence. When driving animals, an owner is required to keep them under control. Under some circumstances (at night or in heavy traffic) and on

some highways (limited access or other highways on which animals could be prohibited), it would be negligent and possibly a violation of the law to drive animals at all.

- It is unlawful for a farmer to tether or turn loose any animals on the highway (or in some circumstances, on a railroad right-of-way) for the purpose of feeding.

In some accidents involving animals on highways, the motorist may be at fault, partially or completely. If the motorist's negligence has contributed toward the accident, the doctrine of comparative negligence will prevent the motorist from recovering full damages from the farmer. Moreover, the farmer may also be able to recover damages. If the farmer was not negligent, he or she may be able to recover the value of the animal from a negligent motorist. Even if negligent, the farmer may still be able to recover part of the damages, provided the motorist was also negligent.

Railroad Fences and Farm Crossings

Illinois law requires every railroad company to maintain fences on both sides of its road, as well as cattle guards at all road crossings, to prevent livestock from getting onto its tracks. Illinois courts have held that farmers have the right to turn their animals against a railroad fence.

A railroad company failing to build fences and cattle guards or to keep them in good repair is liable for all damages that may occur to livestock on its roads. If the railroad company maintains fences and guards that are adequate and in good repair, it is not liable for injury to livestock "unless negligently and willfully done." This law imposes a duty on railroads to maintain adequate fences and guards. It protects the traveling public as well as the owners of livestock. A person suing and recovering damages from the railroad under this law is entitled to reasonable attorney's fees.

Illinois law provides a penalty for driving livestock down a railroad right-of-way (within its fences) without the consent of the railroad, for damaging railroad fences or guards, for leaving gates at farm crossings open, and for leaving horses or other animals standing on farm or road crossings.

When a railroad company neglects to build or repair its fences and farm crossing gates, the owner of the land adjoining the railroad may give written notice to the company to build within thirty days or to repair within ten days, as the case may be. Should the company fail to comply with the notice, the landowner may do the work personally and then sue to recover double the value plus interest of 1 percent a month until payment is made. A railroad company and an adjoining owner may also contract to transfer the duty of maintaining fences to that adjoining owner.

Although Illinois law requires a railroad company to construct farm crossings wherever necessary, a landowner does not have an absolute right to a farm crossing. Factors determining whether a farm crossing is necessary and, if so, what type of crossing is required, include the character and value of the land adjoining the railroad, the benefit accruing to the landowner if the crossing is constructed, the possibility of increased danger to the public from construction of the crossing, and the cost to the railroad of construction and maintenance. The Illinois Supreme Court has stated that the proper test of need is "reasonable convenience" rather than indispensability.

DIVISION FENCES

The Illinois legislature first passed a law concerning division fences in 1819. The law, amended several times, now provides that two or more persons having lands adjoining shall each build and maintain a just proportion of the fence dividing their properties. This fence law is designed to serve two purposes. First, it prevents friction between adjoining owners by specifying each owner's duties. Second, it eliminates the waste of resources resulting from two fences separated by a "devil's lane." Fence viewers have significant responsibility in implementing Illinois fence law. Their role is discussed later in this circular.

The Duty to Fence

Many Illinois farmers keep no livestock and therefore feel that any fencing between their own and adjoining property should be built and maintained by the owner of the adjoining land. As mentioned earlier, however, Illinois law does not relieve them of responsibility. Instead, the law provides that

[w]hen any person wishes to inclose his land, located in any county having less than 1,000,000 population according to the last preceding federal census and not within the corporate limits of any municipality in such county, each owner of land adjoining his land shall build, or pay for the building of, a just proportion of the division fence between his land and that of the adjoining owner and each owner shall bear the same proportion of the costs of keeping that fence maintained and in good repair. [Ill. Rev. Stat., ch. 54, §4]

Illinois law thus gives a landowner the right to compel an adjoining owner to build a division fence. Nonetheless, the landowner desiring the

fence may not attempt to coerce the adjoining owner to build a fence by willfully permitting his or her animals to enter the adjoining owner's property.

The obligation of landowners to contribute their just share toward the cost of maintaining a fence arises at the time the fence becomes a division fence. For example, an owner who sells a part of his or her farm must, with the purchaser, share the responsibility for the division fence from the date of sale.

In addition to private landowners, others may bear responsibility for division fences. School districts in Illinois must repair and maintain all division fences between school grounds and adjoining lands. Although the statute does not prescribe the kind of fence required, it can be assumed that the fence should be a "lawful" one as described in the fence law — one capable of preventing hogs, sheep, cattle, horses, and other stock from entering the adjoining land of another. In addition, Illinois law states that if land adjoining any state park is used for farming, the Department of Conservation must construct and maintain its just proportion of the division fence.

Churches, cemeteries, park districts, and other agencies, whether public or private, are apparently in the same position as other landowners with respect to division fences. If such an agency desires a fence that would exceed the legal requirement, however, it should bear the extra cost of building and maintaining such a fence.

Highway authorities are not required to fence the road right-of-way. The obligations for fencing borne by railroad companies are discussed in the section, "Railroad Fences and Farm Crossings."

The Lawful Fence

Under Illinois fence law, one owner can compel the adjoining owner to build a fence that meets the standard of a "lawful" fence. The law defines a lawful fence as a fence 4½ feet high, in good repair, consisting of rails, timber boards, stone, hedges, barbed wire, woven wire, or other suitable material. The fence is to be sufficient to prevent cattle, horses, sheep, hogs, and other stock from entering the adjoining lands of another.*

* In counties under township organization, the electors at an annual town meeting may determine what shall constitute a legal fence in that township. In counties not under township organization, the county board has the power to regulate the height of fences. In addition, fence viewers of a town or precinct may permit construction with other materials equivalent to those specified in the law.

The corporate authorities of each municipality have the power to regulate fences (not including railroad fences) within the jurisdiction of the municipality. This power would apply to fences on farmland within the corporate limits of the municipality.

This definition helps to prevent disputes about what constitutes a proper division fence. It indicates that one adjoining owner cannot compel the other to use certain kinds of material in the construction of the fence, nor can one owner demand a fence that will turn away animals other than those specified in the law. The definition, however, applies only to division fences, not to other fences on the farm.

Owners whose properties adjoin may agree on the type of division fence that they want. They may agree, for example, that a barbed wire fence or an electric fence on the division line will suffice. Or they may agree that they need no fence at all.

An owner cannot be held liable for injuries to another's animals caused by his or her fence, unless the injury results from the owner's negligence in maintaining the fence.

Electric Fences

Can an electric fence be considered a "lawful" fence under Illinois law? The answer to this question depends on the interpretation of the fence law, particularly those portions giving discretion to fence viewers, township electors, and county boards. Because barbed wire can be used in a legal fence, an electric fence would also seem to meet the requirements for a legal fence if it is in good repair, if the top strand is at least 4½ feet high, and if it will hold the kind of livestock turned against it. An electric fence should be considered a legal fence, however, only if it can safely prevent livestock from trespassing. Adjoining owners may agree to use an electric fence for the division fence.

Because electric fences are used primarily as temporary or movable fences within the farm itself, their legality is often less important than the question of liability for death or injury to persons or to the animals of other owners. When injury to others is caused by negligence in constructing, installing, or maintaining an electric fence, the owner may be held liable for damages. The Illinois law of comparative negligence may sometimes result in liability for the owner even if the injured parties are themselves partially at fault.

Maintaining a Just Proportion

Illinois law requires each adjoining owner to build and maintain a "just proportion" of the division fence. The law does not specify which portion or how much of the fence each owner must build and maintain. By custom, owners ordinarily assume responsibility for a designated half of the fence, usually the half to their right as, standing on their own property, they face the division line. Owners may agree, however, to divide the

responsibility in another way. If one part of the fence is more difficult or expensive to maintain, for example, the owner maintaining that part may be responsible for less than half of the entire fence.

Ordinarily, a floodgate or water gap is maintained by the owner in whose end of the fence it happens to lie. Because the law states that each owner shall maintain a "just proportion" of the fence, there is no reason why an owner who maintains a floodgate or water gap should not be compensated by having a smaller proportion of the fence to maintain.

When owners cannot agree on the proportion of the division fence that each must build or maintain, the law provides that fence viewers can specify the proportion for which each owner is responsible. One decision that fence viewers cannot make, however, is that each owner should maintain his or her own side of a hedge fence.

In making their decision, the fence viewers will examine the premises and listen to the allegations of the parties. They may also question previous owners and tenants, as well as employees of the farm, to see which portion of the fence had been maintained by former owners.

The Right to Discontinue Maintenance

The law prescribes the conditions under which an owner (A) may stop maintaining his or her part of a division fence. Stated briefly, owner A must give the adjoining owner (B) one year's written notice of A's intention to remove a portion of the fence; receive permission for removal from the adjoining owner; and let adjacent lands lie uncultivated and un-pastured. Even if these conditions are met, owner B may prevent owner A from removing A's portion of the fence by having the value of that portion determined by fence viewers and by paying the amount of that valuation to owner A. But if a fence has been removed entirely in accordance with this law and a new one has been erected, any person wanting to use the new fence must pay one-half of its original cost to the owner.

A landowner who fails to comply with these requirements and removes a division fence without giving the adjoining owner written notice can be held liable for all damages that may result. Should an unlawful removal be made, the adjoining owner may rebuild the fence at the expense of the person who made the unlawful removal.

Construction and Repair

Illinois law provides two remedies for situations in which an owner neglects to repair or rebuild a just portion of a division fence. First, the adjoining owner may have two fence viewers of the town or precinct examine the fence. If the fence viewers find that the fence is inadequate,

they are required to direct the negligent owner to repair or rebuild a just proportion of the division fence within a reasonable time.

The second remedy applies to repair as well as to the initial erection of a division fence. Under this provision, an owner may give sixty days' written notice to an adjoining owner to build the fence or ten days' written notice to repair the fence. Should the adjoining owner fail to comply with this notice, the complaining owner may build or repair the fence. Under this provision, too, the owner may hold the adjacent owner liable for any damage resulting from neglect of the fence and may recover the expense of building or repairing the fence, along with costs of suit.

An Illinois court decision suggests that one who repairs a fence under this provision cannot collect for the cost of repair unless fence viewers have first determined that repairs were necessary. In any event, fence viewers should be consulted. The concurrence of fence viewers on the genuine need for repairs will aid the complaining owner, should court action prove necessary.

The law also provides that when fire, flood, or other casualty damages or destroys a division fence, that portion of the fence must be rebuilt or repaired by the person responsible for it within ten days after the latter has received written notice to do so. If a flood destroys a floodgate or a part of the fence that crosses a stream or natural watercourse, however, the owner must rebuild or repair within two days after being notified. Should the owner, under these circumstances, fail to make repairs within the time specified by law, the injured party may do the work and recover the expenses as well as costs of suit if legal action is necessary.

Mislocated Fences

The Illinois fence law includes provisions that apply to mislocated fences. An owner who has mistakenly built a division fence on an adjoining owner's land may enter that land and move the fence to the true line within six months after the true line has been run. If removal within that six-month period will expose the crops of either party to livestock, the fence may be removed within a reasonable time after crops are secured. If the fence was made of materials taken from the land on which it was built, it may be removed only after the owner pays (or tenders payment) for materials taken from that land. These provisions for the removal of mislocated fences, however, do not alter the law that applies to fences mislocated for twenty years or more.

If a fence marking the boundary between two tracts of land has been mislocated for more than twenty years, a permanent change in ownership may result through the law of adverse possession. The Illinois law of ad-

verse possession has a number of technical requirements. In general, it must be established that the claimant's possession of the land in question has been hostile or adverse, actual, open and notorious, exclusive, continuous for more than twenty years, and under a claim of ownership. Proof of adverse possession must be clear and convincing. Illinois courts have held that a mislocated boundary fence may satisfy these requirements. A lawsuit is necessary to establish clear title by adverse possession, however, and a landowner who has questions on this matter should consult an attorney.

Fence Viewers

The fence viewers are a local body with significant responsibility to implement Illinois fence law effectively. In counties under township organization, town boards of auditors are ex officio fence viewers. In counties not under township organization, the presiding officer of the county board, with the advice and consent of the board at its annual meeting, appoints three fence viewers in each precinct to one-year terms.

Fence viewers have three main responsibilities:

1. to determine the value of a division fence when adjoining owners cannot agree on the amount that one owner should contribute to another for building the fence, or when one owner intends to let his or her land lie open and the adjoining owner wishes to buy that portion of the fence;
2. to fix, when disputes arise, the proportion of a division fence to be maintained by each owner; and
3. to examine the fence on the complaint of one owner that an adjoining owner has failed to make the necessary repairs and, if the fence requires repairs, to order the delinquent party to make them within a reasonable, specified time.

When fence viewers must be consulted, adjoining owners ordinarily engage two viewers to resolve the dispute. Each party may choose one of the viewers, but if one owner should neglect to do so, the other owner may choose both after giving eight days' written notice. If the two viewers disagree, they may select a third viewer to act with them.

In performing their functions, fence viewers may compel testimony with regard to any questions submitted to them, and each has the power individually to issue subpoenas for and administer oaths to witnesses.

For the time spent settling fence disputes, each viewer is entitled to payment of \$1.50 a day from the party requesting the services. Expenses of the fence viewing are usually shared equally by the parties. But if the viewers determine that one party is at fault for failure to build or main-

tain a just proportion of the division fence, that person must bear the entire cost.

Fence viewers must conform strictly to the law and act only in the area over which the law gives them authority. Their decisions must be written and filed with the town clerk or, in counties not under township organization, with the county clerk. A decision by any two fence viewers binds the parties to the dispute and all those who receive ownership or possession of the land from the parties. Nonetheless, a party is entitled to seek judicial review of the fence viewers' decision for the purpose of determining whether the decision was arbitrary and inequitable.

HEDGE FENCES

Hedges may be used as division fences according to Illinois fence law. Hedges are also frequently used along highways. Because hedges require regular trimming, Illinois law includes some special rules for hedge fences.

The law does not prescribe the type of hedge that may be used as fencing. Osage-orange hedges are mentioned specifically, but apparently other fences, including multiflora rose, come within the legal requirements that apply to hedges.

Trimming Hedge Division Fences

Illinois law requires the owner of a hedge division fence to trim it to a height of 4 feet or less the year after the hedge becomes seven years old, and to 5 feet every two years after that time. Trimming must be done on or before June 15. If an owner fails to trim the hedge as required by law, an adjoining owner who has complied with the fence law may give ten days' written notice. After that time, the adjoining owner may trim the hedge and recover the cost from the owner of the hedge.

Sixty rods of hedge in a division fence may be left untrimmed to protect wildlife, orchards, buildings, or windbreaks, or to protect against soil erosion. The hedge must actually be serving as protection if this exception is to be made. The mere prospect of such use is not considered a sufficient reason for failure to trim the hedge.

In trimming a hedge fence, even one neglected by an adjoining owner, a person is entitled only to his or her share of the posts that might be taken out of the trimmings.

Trimming Hedges Along Highways

Illinois law requires the regular trimming of hedge fences growing along the right-of-way line of any public highway so that the hedges will not obstruct the public highway, impair its usefulness, or endanger the

public. In the year after a hedge fence becomes seven years old, the owner must trim it to a height of 5 feet or less; at least once every year after that time, the hedge must be trimmed to 5 feet. An osage-orange hedge is subject to the same regulations, except that annual trimming need not begin until the second year after it is first trimmed, and it must be trimmed to a height of 4 feet. In addition to height requirements, owners must trim hedges on the roadside so that foliage will not extend more than 4 feet over the right-of-way line. All required trimming must be done before October 1.

The appropriate highway authority may permit an owner to leave as much as one-fourth of the length of a hedge fence along a highway untrimmed to serve as a windbreak for livestock. The owner must apply for this privilege, and the permission can be revoked at any time.

Planting willow hedge fences on the margin of highways has been made illegal in Illinois. Where such hedge fences already exist so as to make tiling impracticable, the appropriate highway authority may contract with the owner for their destruction before tiling.

Removing Hedges

One landowner cannot force another to remove a hedge because Illinois law refers only to the trimming and not the removal of hedges. If, however, a division hedge fence as trimmed will not contain animals, the owner may be forced to make the hedge a "lawful" fence. The owner may do this by reinforcing the hedge with other material or by removing the hedge and replacing it with a different kind of fence.

Liability for Crop Damages

Where a landowner maintains a hedge in his or her portion of the division fence according to the law, there is no liability for crop damage caused to adjoining property. Although the law is not clear about liability when hedges are maintained contrary to the trimming statute, it seems reasonable that an owner should be liable for damages resulting from improper trimming. This principle would also apply to hedges that are not part of a division fence but that nevertheless overhang and damage adjoining property.

No Illinois cases discuss damages for loss of yield caused by overhanging branches and trespassing roots of individual trees. One remedy available to an adjoining owner is to trim the overhanging limbs and remove the roots that cross the division line.

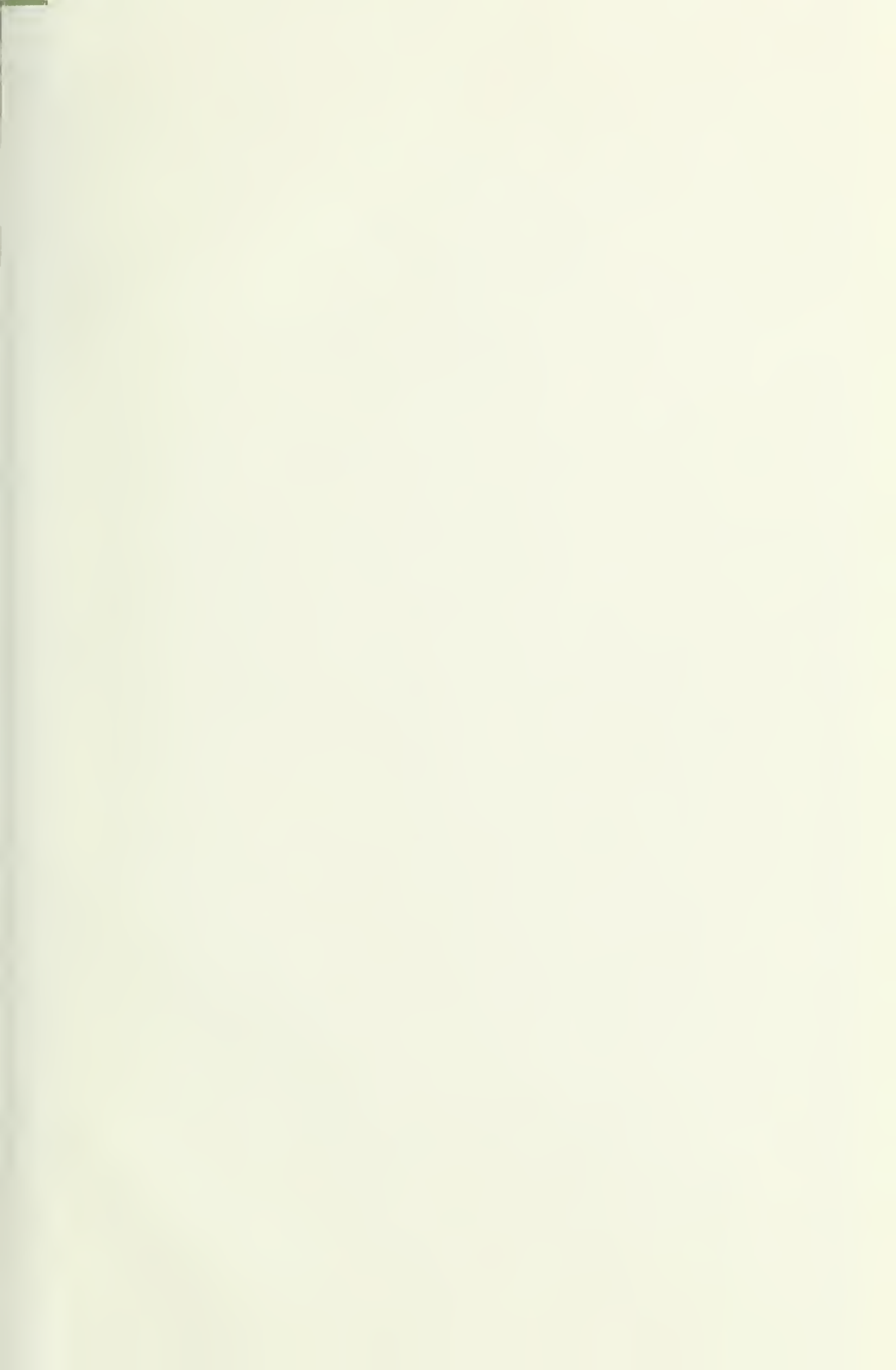
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